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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DOSS S. JONES; WILMA JONES,
Petitioners,
v.
VIOLET ANN LUCAS,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION THREE

PETITION FOR CERTIORARI - CONTRACT CLAIM

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QUESTIONS PRESENTED

1. Is the opinion of the Court of Appeal of the State of California inconsistent with the concept of reliance which underlies the "window period" exception to blanket due-on-sale enforceability under the Garn-St. Germain Depository Institutions Act of 1982?

2. Did the Court of Appeal erroneously conclude that the Federal Home Loan Bank Board Rules do not apply to individual lenders and thus fail to consider the controlling interpretations of the Garn Act contained in those rules?

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OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is reported at 148 Cal.App.3d 1008, 196 Cal.Rptr. 437 (1983) [Appendix A]. The Order of the Supreme Court of the State of California denying a hearing is not reported [Appendix B].

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, was entered on November 15, 1983. The order of the Supreme Court of the State of California denying petitioner's petition for hearing was entered on January 18, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES AND REGULATIONS INVOLVED

The statute involved in this matter is section 341 of the Garn-St. Germain Depository Institutions Act of 1982,

12 U.S.C. § 1701j-3. The particular subsections most directly involved are §§ 1703j-3(b)(1) and 1701j-3(c)(1).

Subsection 1701j-3(b)(1) reads as follows:

> Notwithstanding any provisions of the Constitution or laws (including the judicial decisions) of any state to the contrary, a lender may, subject to Subsection (c) of this section, enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan.

Subsection 1701j-3(c)(1) reads, in pertinent part, as follows:

> In the case of a contract involving a real property loan which was made or assumed, including

a transfer of liened property subject to the real property loan, during the period beginning on the date on which the exercise of due on sale clauses, or the date on which the highest court of such State has rendered a decision (or if the highest court has not so decided, the date on which the next highest appellate court has rendered a decision resulting in a final judgment if such decision applies State-wide) prohibiting such exercise, and ending on October 15, 1982, the provisions of subsection (b) of this section shall apply only in the case of a transfer which occurs on or after the expiration of three years after October 15, 1982....

The Regulations involved are the final rules of the Federal Home Loan Bank Board, 12 C.F.R. §§ 591.1-591.6. The pertinent subsections are §§ 591.1(b), 591.2(g), 591.2(p)(1), and 591.2(p)(2)(ii).

Section 591.1(b) reads as follows:

The purpose of this permanent preemption of state prohibitions on exercise of due-on-sale clauses by all lenders, whether federally or state chartered, is to reaffirm the authority of the Federal Savings and Loan Associations to enforce due on sale clauses, and to confer on other lenders generally comparable authority with respect to exercise of such clauses. This part applies to all real property

loans, and all lenders making such loans, as those terms are defined in Section 591.2 of this part.

Section 591.2(g) reads, in pertinent part, as follows:

> "Lender" means a person or government agency making a real property loan, including without limitation, individuals, federal associations, state chartered savings and loan associations, national banks [numerous other entities]... and any assignee or transferee, in whole or in part, of any such persons or agencies.

Section 591.2(p)(i) reads, in pertinent part, as follows:

> A "window period loan" is a real property loan, not originated

by a federal association, which was made or assumed during a window period created by state law and subject to that law....

Section 591.2 (p)(2)(ii) reads as follows:

(2) The window period begins on:

...

(ii) The date on which the highest court of the state rendered a decision prohibiting such unrestricted exercise (or if the highest court has not so decided, the date on which the next highest appellate court rendered a decision resulting in a final judgment which applies state-wide), and ends on the earlier date such state law prohibition terminated

under state law or October 15, 1982.

STATEMENT OF THE CASE

(a) Statement of Facts

The material facts pertinent to this petition may be briefly summarized as follows:

Petitioners Doss and Wilma Jones ("Jones") are husband and wife and senior citizens. The Joneses owned certain California property until July 16, 1973, at which time they sold it to Larry and Charlotte Johnson ("Johnson") [C.T. 193:9-16]. The bulk of the agreed purchase price paid by the Johnsons was represented by a 30-year 7-1/2% note secured by first deed of

trust on the property sold [C.T. 64:20-65:10; C.T. 193:18-20]. The note and deed of trust contain the following, expressly bargained for, "due-on-sale" acceleration clause:

> In the event of sale, alienation, or conveyance of all or any portion of the property described in this Deed of Trust, whether voluntary or involuntary, and irrespective of the maturity dates expressed herein any indebtedness or obligation, at the option of the holder shall be immediately become due and payable.

On September 28, 1979, the Johnsons sold the property to Steven L. Lucas and respondent Violet Ann Lucas ("Lucas") [C.T. 75; C.T. 193:26-28]. The Johnsons

received back from the Lucases an "all-inclusive" deed of trust and a $274,000.00 note (including the balance due to the Joneses), which it provided all came due in February, 1981 [C.T. 22-25; C.T. 194:1-4].

When the Joneses learned of the sale and started foreclosure proceedings by recording a Notice of Default, the Johnsons filed an action in Orange County Superior Court and, on April 11, 1980, obtained a temporary restraining order [C.T. 1-30]. Thereafter, in May 1980, the Johnsons obtained a preliminary injunction against the pending foreclosure, which injunction was finally reduced to a formal order in August 1980 [C.T. 100-104; C.T. 194:5-12]. In late March, 1981, the Lucases paid the sums due on the all-inclusive trust deed note and a full reconveyance was issued

[C.T. 6]. In early September 1981, the Joneses moved to dissolve the preliminary injunction which the Johnsons had obtained in 1980 [C.T. 86:112]. That motion was not seriously opposed, and the injunction was ordered dissolved on September 10, 1981 [C.T. 114-115].

When the Joneses proceeded again with their foreclosure under the first deed of trust, Violet Ann Lucas[1] filed an answer and cross-complaint and applied to the Orange County Superior Court for a preliminary injunction. That motion was granted and a new preliminary injunction was issued in January 1982 [C.T. 221-226].

It is that January 1982 Order Re Preliminary Injunction from which Joneses

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(1) Stephen Lucas has never appeared in the action and was defaulted [C.T. 83-85; C.T. 19:15-21].

appealed to the California Court of Appeal [C.T. 227-228].

(b) Federal Questions Presented Below

The federal questions on which this petition turns did not arise until the passage of the Garn-St. Germain Depository Institutions Act of 1982 in October 1982.(2) At that time, the instant case was on appeal to the Court of Appeal below. Thus, it was at that stage in the proceedings below that petitioners first timely raised, on pages 9-16 of their opening brief to the Court of Appeal, their contention that the Garn Act prohibited all state restrictions on due-on-sale clause enforceability

(2) Pub.L. 97-30, 96 Stat. 1469; 12 U.S.C. 1701j-3.

except in narrow circumstances not applicable to the facts in this case. Petitioner contended below, as it does in this Court, that the preliminary injunction against enforcement of the due-on-sale clause contained in the Joneses' note and deed of trust should be dissolved because of the absence, in September 1979 (the time when the Lucases "assumed" the Joneses' trust deed and note) of any state restriction on the enforceability of due-on-sale clauses in private lender transactions.

The Court of Appeal rejected petitioners' contentions and refused to dissolve the preliminary injunction. The court reached its result by (a) treating the institutional lender case of Wellenkamp v. Bank of America, 71 Cal.3d 943, 582 P.2d 970, 148 Cal.Rptr. 379 (1978) as though it did not contain

an express exclusion of private lender situations, and by (b) finding significance in the Supreme Court's subsequent silence on the issue of retroactivity in Dawn Investment Co. v. Superior Court, 30 Cal.3d 695, 639 P.2d 674, 180 Cal.Rptr. 332 (1982) -- a silence which the Court of Appeal equated with an implied broadening of Wellenkamp beyond its express holding and with retroactivity of Dawn [Appendix A, pp. 7-11].

In May 1983, after the petitioners and respondents had submitted their briefs to the Court of Appeal, the Federal Home Loan Bank Board published its final rules and interpretations implementing the Garn Act, effective May 10, 1983. (48 Fed.Reg. 21554 et seq. (May 13, 1983); 12 C.F.R. §§ 591.1-591.6.) The Appellate Court took cognizance of the preemptive effect of the

Federal Home Loan Bank Board regulations, but found that they did not apply in this case. [Appendix A, p. 13.]

On timely application for hearing before the California Supreme Court, filed December 22, 1983, petitioners raised in their petition the same federal issues that they raise herein. The California Supreme Court, without comment, denied a hearing on January 18, 1984, with Justice Grodin being of the opinion that a hearing should be granted [Appendix B].

REASONS FOR GRANTING WRIT

In this case, the Court of Appeal has held that, in the absence of a showing of impairment of security, a California private lender may not

enforce a due-on-sale clause in relation to a 1979 transaction.

The pivotal issue before the court below was whether the existence in California of both the 1978 California Supreme Court decision in Wellankamp (which expressly held only that institutional lenders may not enforce due-on-sale clauses unless there is an impairment of security), and the 1982 California Supreme Court decision in Dawn (which for the first time extended the Wellenkamp rule restricting the enforceability of due-on-sale clauses to private lenders), resulted in a single or multiple window periods under the narrow Garn Act "window period" exception to automatic enforceability of due-on-sale provisions.

The court below attempted to answer this important federal question involving

the Garn Act window period by disregarding the legislative history and purpose of the Garn Act itself, and by mistakenly dismissing as inapplicable to private lenders, the Federal Home Loan Bank Board Rules and interpretations implementing the Act. As a result, the decision and reasoning of the court below are without foundation in the legislative history and intent of the Garn Act, are not compelled by the text of the Act, and are clearly contrary to the Federal Home Loan Bank Board implementing regulations and interpretations.

Resolution of the important and as yet unsettled federal questions presented in this case will have a direct and significant economic impact on unknown thousands of real estate transactions in California and possibly throughout the nation. Because

California courts have been in the forefront in the continuing debate over enforceability of due-on-sale clauses, the erroneous decision and reasoning of the Court of Appeal has the potential for undermining the true purpose of the Garn Act and placing its future effectiveness and administration in jeopardy.

I. THE OPINION OF THE APPELLATE COURT IS INCONSISTENT WITH THE CONCEPT OF RELIANCE WHICH UNDERLIES THE GARN ACT WINDOW PERIOD EXCEPTION TO BLANKET DUE ON SALE ENFORCEABILITY

The Garn Act, with certain narrow and clearly defined exceptions, provides for blanket federal preemption of all state restrictions on due-on-sale clause enforcement, regardless of the nature of

the lender.[3] Although the general purpose and effect of the Garn Act is to provide for blanket invalidation of state restrictions on due-on-sale enforcement, Congress also recognized that prior to the effective date of the Act, statutes and court decisions in many states had restricted due-on-sale enforcement and that such restrictions may have been relied upon by "borrowers" who had entered into real estate transactions prior to the passage of the Act. Accordingly, Congress carved out the window period exception to blanket due-on-sale clause enforceability for certain real property loans that were "made or assumed...during the period beginning on the date a state adopted a

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(3) See 12 U.S.C. § 1703j-3(b)(1) for specific operative language of the Garn Act.

constitutional provision or statute prohibiting the exercise of due-on-sale clauses, or the date on which the highest court of such state has rendered a decision...prohibiting such exercise, and ending on October 15, 1982...:" (Pub. L. 97-320, §341(c)(1); 12 U.S.C. § 1701j-3(c)(1).)

The rationale for this window period exception is described in the legislative history of the Garn Act:

> A blanket federal preemption of state restrictions on enforcement of due on sale clauses would, however, have an unfair impact on those home buyers who, despite the contractual terms of their mortgage contracts, relied on state due-on-sale restrictions and reasonably believed they

had assumable loans. (Senate Report (Banking, Housing and Urban Affairs Committee), S.Rep.No. 536, 97th Cong., 2nd Sess. (1982), 22.)) (Emphasis added.)

As this passage indicates, the clear intent of the Garn Act window period was to insure that those who may have reasonably relied upon existing express state restrictions on due-on-sale enforcement were not injured by the subsequent change in the law effected by the Act.

Given the "reliance" rationale which underlies the window period exception to unrestricted enforcement of due-on-sale clauses, it becomes manifest that Congress intended that separate window periods should be established for

different categories of real estate transactions. The commencement date for a particular window period, of course, depends on whether the parties to the real estate transaction had reasonably relied upon existing express state restrictions on due-on-sale enforcement at the time of "making" or "assuming" the real estate loan in question.

As noted above, the issue of whether the Garn Act mandated distinct window periods in California based on the 1978 Wellenkamp decision and the 1982 Dawn decision was squarely before the Court of Appeal. However, in attempting to answer this important federal question, the Appellate Court entirely failed to explore the concept of reliance which underlies the Garn Act window period exception, and which, it is submitted, clearly results in the creation of two

distinct window periods in California -- one commencing on the date of the Wellenkamp opinion (August 25, 1978) as to institutional loans; and the other commencing on the date of the Dawn decision (February 4, 1982) as to private loans.

In September 1979, when respondent Lucas and her then husband "assumed" the Joneses purchase money loan, she did not and could not have relied on any then existing state statute or decision restricting private lender enforcement of the due-on-sale provisions contained in the Joneses note and deed of trust, because none existed. The State Supreme Court in Wellenkamp, had expressly declined to extend its holding to private lenders:

> In the instant case, the party seeking the enforcement of the

> due-on-sale clause is an institutional lender. We limit our holding accordingly. We express no present opinion on the question whether a private lender, including the vendor who takes back secondary financing, has interests which might inherently justify automatic enforcement of due on sale clause in his favor upon resale. (Wellenkamp, supra, 71 Cal.3d at 952, 582 P.2d at 976, 148 Cal.Rptr. at 385 fn. N.9) (Emphasis added.)

The post Wellenkamp uncertainty in the area of private lender due-on-sale enforcement is exemplified by the following statement in Wilheit v. Callahan 121 Cal.App.3d 661, 665, 175

Cal.Rptr. 507, 510 (1981):

> Since the disclaimer in Wellenkamp ... the private lender or buyer of property has been left in a pergatory of uncertainty. (Emphasis added.)

During the almost two and one half years between the respondent's 1979 "assumption" of the Jones note and deed of trust and the Supreme Court's Dawn decision, the final resolution of the private lender due-on-sale enforcement defied all attempts at prediction. As a matter of fact, in March 1981, the Court of Appeal decision in Dawn was issued (Dawn Investment Co. v. Superior Court, 116 Cal.App.3d 439, 172 Cal.Rptr. 142 (1981), permitting due on sale acceleration for private lenders. In April

1981, California Assembly Bill 2158 was introduced. Although not ultimately enacted, that legislation sought to legislatively override Wellenkamp in its entirety. To add to the obvious confusion, in July 1981, the Court of Appeal decision in Wilheit denied automatic enforcement of due on sale acceleration to a private lender. In October 1981, the Garn Act was introduced in Congress. Ultimately in February 1982, the California Supreme Court's Dawn decision was issued. In October 1982, the Garn Act took effect, finally settling the status and enforcement of due on sale provisions for all lenders -- in all states. Against this background, respondent in September of 1979 simply had no basis to conclude that the loan affecting the property which she was purchasing was assumable.

Unfortunately, the Court of Appeal, rather than focus on the underlying philosophy behind the Garn window period exception, attempted to resolve the issue of whether separate window periods were triggered by the Dawn and Wellenkamp decision by limiting itself to an impermissibly narrow, as well as faulty, analysis of the language of the two decisions. In particular, the Court of Appeal failed to give effect to Wellenkamp's own express limitation of its holding to institutional lenders. Instead, the court leapfrogged forward more than three years to find significance in the holding in Dawn with respect to private lenders, coupled with the Supreme Court's silence on the issue of retroactivity. From that silence the Court of Appeal concluded:

We conclude Dawn's conclusion can only mean that the court viewed Wellenkamp as creating a broad rule against automatic enforceability of due on sale clauses and Dawn is refusing to create an exception for private lenders. The Supreme Court would surely have addressed the issue of Dawn's own retroactivity if that were not the case. On this subtle but, we believe, well founded distinction, we must conclude the post-Wellenkamp, pre-Act transfer to Lucas falls within California's window period. (148 Cal.App.3d at 1012, 196 Cal.Rptr. at 439.)

The reasoning of the Court of Appeal obviously missed the point. Under the Garn Act, the existence of a separate window period for private lenders does not depend on what the California Supreme Court, four years after issuing its Wellenkamp opinion, may have thought that opinion meant in retrospect. Rather, as pointed out in a recent criticism of the Court of Appeal's reasoning, the issue "is whether a borrower or an assuming grantee of a non-institutional loan who read Wellenkamp at the time reasonably could have relied on it as making a loan assumable."(4) Manifestly, the answer to the question of whether the Lucases in September 1979, could reason-

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(4) (G. Nelson and A. Whitman, "Congressional Preemption of Mortgage Due on Sale Law: An Analysis of the Garn St. Germain Act," 35 Hast.L.J. 241, 290 fn. 274 (1983).

ably have relied upon Wellenkamp or any other then-existing state restriction on due-on-sale enforcement as applying to private lender transactions, is "no." It was not until the Dawn decision in February 1982 that a second window period covering non-institutional lenders and loans began.

Since respondent's "assumption" of the Joneses' loan fits within neither of these window periods, it was not and is not entitled to the Garn Act's window period exception to due-on-sale enforceability.

2. THE COURT OF APPEAL ERRONEOUSLY CONCLUDED THAT THE FEDERAL HOME LOAN BANK BOARD FINAL RULES DO NOT APPLY TO INDIVIDUAL LENDERS AND THUS FAILED TO GIVE EFFECT TO THE CONTROLLING INTERPRETATIONS OF THE GARN ACT CONTAINED IN THOSE RULES

In footnote 6 at the end of its opinion, the Court of Appeal refers to the final rules published by the Federal Home Loan Bank Board which became effective on May 10, 1983 (12 C.F.R. §§ 591.1-591.6) and the interpretations of the Garn Act and those final rules published on May 13, 1983 (48 Fed.Reg. 21554-21563). However, citing language contained in the "Final Regulatory Flexibility Analysis" (issued in order to comply with the Regulatory Flexibility

Act) on 48 Fed.Reg. 21560, the Court of Appeal reached the mistaken conclusion that because individual lenders were not specifically mentioned in the language quoted by the Court of Appeal, the Board's final rules and accompanying analysis do not apply to individual lenders such as Petitioner.

The Court of Appeal was mistaken. It is only necessary to read the Rules themselves to find that they apply to all "lenders" as defined in the Garn Act. Thus, § 591.1(b) of the Rules ("Purpose and Scope") states:

> This Part applies to all real property loans, and all lenders making such loans, as those terms are defined in Section 591.2 of this Part. (Emphasis added.)

Section 591.2 ("Definitions"), subparagraph (g) defines "lender" as follows:

> "Lender" means a person or government agency making a real property loan, including without limitation, individuals, Federal associations, state chartered savings and loan associations... [numerous other entities].... (Emphasis added.)

Once it is understood that the Federal Home Loan Bank Board rules do in fact apply to individual lenders, a new, viable and controlling body of opinion and interpretation becomes available in discerning the meaning and application of the Garn Act. (Fidelity Federal Sav. & Loan Assn. v. de la Cuesta (1982) 458

U.S. 141.) That federal authority supports petitioner's contentions.

For example, Section 591.2(p)(1) of the Rules defines a window period loan as:

> ...a real property loan, not originated by a Federal association, which was made or assumed during a window period created by state law and subject to that law.... (Emphasis added.)

Section 591.2(p)(ii) goes on to define the commencement of a state window period as follows:

> (ii) The date on which the highest court of the state rendered a decision prohibiting such unrestricted exercise [of due-on-sale clauses upon

> outright transfers of property securing loans subject to the state law creating the window period]....

The discussion of these rules by the Board gives valuable insight into the Board's interpretation of the Garn Act. Referring repeatedly to the legislative history of the Act as contained in the Senate Report of the Banking, Housing & Urban Committee (S.Rep. No. 536, 97th Cong., 2nd Sess. (1982)), the Board discusses its rules regarding window period loans strictly in terms of borrower reliance upon a state statute or judicial decision restricting due-on-sale enforcement. Thus, at various points in its discussion of the window period exception, the Board made the following comments:

...Congress also indicated that the basic purpose of the window-period was to treat fairly home buyers who "relied on state law restrictions and reasonably believed they had assumable loans." S.Rep. at 22. Conversely, the legislators did not intend to create window-periods for loans never subject to state law restrictions. This "limited reliance" principle is reaffirmed in the legislative history of Act Section 341(c), which declares that states are not authorized to expand the kinds of loans subject to the window-period. S.Rep. at 23.

. . .

Finally, the Board believes

that this reliance principle, along with the principle that states may not retroactively expand the scope of the window-period, would require that a state judicial decision creating the window-period include language expressly holding a due-on-sale clause unenforceable, rather than merely commenting on unenforceability in dicta.

. . .

The Board believes that this revision is consistent with Congressional intent to protect only a borrower's reasonable expectations and reliance on the contract terms as they existed at the time of origination or assumption of the

> loan, and not to extend or create a window-period in a state where none existed under state law. S.Rep. at 22. (48 Fed.Reg., supra, at 21557) (Emphasis added.)

From the foregoing, it is clear that the Board understood that the window period exception was created solely to protect those who had relied on state laws or decisions expressly restricting the due-on-sale enforcement of their loans at the time those loans were being made or assumed. As the Board indicates, Congress did not intend to create a window period "for loans never subject to state law restrictions" -- and at the time respondent purported to assume appellants' loan, such a loan from a private lender simply was not and

had never been subject to due-on-sale restriction in California.

What statement of Garn Act intent could be clearer on the subject of the decisional gap between Wellenkamp and Dawn than the Board's statement that a window period decision should "include language expressly holding a due-on-sale clause unenforceable, rather than merely commenting on unenforceability in dicta?"

Finally, in commenting upon its rules, the Board made the following additional observation:

> In the Board's view, a loan falls within the ambit of window-period protection only if it is the specific category of loan to which state legislative action or judicial decision applied in prohibiting the unrestricted exercise of

> due-on-sale clauses. (48 Fed.Reg., supra, at 21557. (Emphasis added.)

To what specific category of loan did the Wellenkamp decision apply? Expressly and unambiguously it applied only to loans made by institutional lenders. Not until February 4, 1982 -- the date of issuance of the Dawn decision -- did a judicial decision exist in the State of California restricting the specific category of loan which was before the Court of Appeal in this case -- a loan made by a private lender.

As a result of its mistaken conclusion that the Federal Home Loan Bank Board Rules and supporting commentary do not apply to private lenders, the Court of Appeal failed to consider a vital and controlling source of interpretation and

regulation which provides much-needed guidance in applying the Garn Act to the transaction between petitioners and respondent.

CONCLUSION

The Garn Act was sorely needed federal legislation. When enacted, it provided a reasonable solution to due-on-sale enforcement binding on all states under the supremacy clause. That Act, its legislative history and subsequent regulations all make it clear that the narrow window period exception to blanket due-on-sale enforcement is based on the concept of reliance on express state restrictions prohibiting due-on-sale enforcement.

The opinion of the Court of Appeal failed to give effect to the history, intent and text of both the Garn Act and its implementing regulations. It is critical to the future course of the Garn Act that this Court review the erroneous decision of the Court of Appeal.

DATED: April 13, 1984.

Respectfully submitted,

BEST, BEST & KRIEGER

By: William R. DeWolfe

William R. DeWolfe
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APPENDIX A

[148 Cal.App.3d 1008, 196 Cal.Rptr. 437]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

VIOLET ANN LUCAS, Cross-Complainant and Respondent, v. DOSS S. JONES; WILMA JONES, Cross-Defendants and Appellants.	)	O P I N I O N 4 Civil No. 30171 Super. Ct. No. 33-21-57

APPEAL from an order of the Superior Court of Orange County. Robert Fitzgerald, Judge. Affirmed.

Best, Best & Krieger and William R. DeWolfe for Cross-Defendants and Appellants.

Musick, Peeler & Garrett, Thomas J. Kelley, Robert Zeller and Nicholas A. Cipiti for Cross-Complainant and Respondent.

* * *

Sellers (Jones) sold two parcels of real property in 1973, carrying secondary financing for the buyers. When the buyers transferred the property to subsequent purchasers (Lucas) subject to sellers' loan in 1979, Jones sought to enforce the due-on-sale clause in the promissory note and the deed of trust securing the property. The second sale occurred after the decision in Wellenkamp v. Bank of America (1978) 21 Cal.3d 943, where the Supreme Court prohibited automatic enforcement of due-on-sale clauses as unreasonable restraints on alienation, except where security is

impaired.[1] In Wellenkamp, however, the court declined to express a ". . . present opinion on the question whether a private lender, including the vendor who takes back secondary financing, has interests which might inherently justify automatic enforcement of a due-on clause in his favor upon resale." (Id., at p. 952, fn. 9.)

Lucas cross-complained for injunctive relief to prevent foreclosure under the due-on-sale clause. On January 19, 1982, the trial court applied the Wellenkamp rationale and enjoined Jones, private lenders who took back secondary financing, from enforcing the due-on-sale clause. The preliminary

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[1] Civil Code section 711 provides, "CONDITIONS RESTRAINING ALIENATION VOID. Conditions restraining alienation, when repugnant to the interest created, are void."

injunction also required Lucas to post a bond, keep the payments current, and cure all defaults on the property. Implicit in the court's action was a finding Jones' security was not impaired by the Lucas purchase. Jones appealed.

The trial court's action appeared to be validated almost immediately; on February 4, 1982, the Supreme Court affirmed Wellenkamp's application to private lenders and transfers of commercial property. (Dawn Investment Co. v. Superior Court (1982) 30 Cal.3d 695.) But the state policy against enforcement of due-on-sale clauses was short lived. The Garn-St. Germain Depository Institutions Act of 1982[2] (Act) was signed into law on October 15, 1982, and all state

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[2] Public Law No. 97-320, 96 Stat. 1469; 12 U.S.C. section 1701j-3.

legislative and judicial restrictions on enforceability of due-on-sale clauses, except for certain "window period" loans, were preempted. The Act defined the window period as ". . . the period beginning on the date a State adopted a constitutional provision or statute prohibiting the exercise of due-on-sale clauses, or the date on which the highest court of such State has rendered a decision . . . prohibiting such exercise, and ending on October 15, 1982 . . . ." (12 U.S.C., § 1701j-3(c)(1).) Real property loans originated or assumed, including transfers of the property "subject to" the loan, between the date of state action restricting enforcement of the due-on-sale clause and October 15, 1982, are exempt from the Act and subject to state law until

October 15, 1985.[3] The Act does not establish the commencement date for any state's window period; this determination was left ". . . to state interpretation and state judicial decision." (48 Fed.Reg. 21555 (May 13, 1983).) There is no question California is a window period state. There is considerable disagreement, however, as to the commencement date of California's window period and whether there is more than one window period.

Lucas argues there is only one window period in California, beginning for all lenders with Wellenkamp, and California's prohibition against enforcement of the due-on-sale clause applies to the post-Wellenkamp transfer to her.

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[3] The Act authorizes states to shorten, but not extend, this period. (12 U.S.C. § 1701j-3(c)(1)(A).)

Jones concedes the window period in California opened for institutional lenders in 1978 with Wellenkamp, but argues there is a different window period for private lenders which did not open until the Dawn decision in 1982. Since Lucas purchased the property before Dawn, Jones contends the Act preempts California law and the due-on-sale clauses is enforceable.

The dispute resolves to one simple but elusive question. Did Wellenkamp lay down a broad general rule against enforcement of due-on-sale clauses or did it only address the commercial lender, leaving other areas to future decision? In other words, did Dawn mark an extension of the Wellenkamp rule or simply a refusal to create an exception from its purview for private lenders?

The language of Wellenkamp, which was obviously crafted without the miraculous prescience which would have been required to anticipate the problem presented here, is equivolcal. In its now notorious footnote 9, Wellenkamp uses language in consecutive sentences which would support either position: "In the instant case the party seeking enforcement of the due-on clause is an institutional lender. We limit our holding accordingly. We express no present opinion on the question whether a private lender, including the vendor who takes back secondary financing, has interests which might inherently justify automatic enforcement of a due-on clause in his favor upon resale." (I.e., require an exception to the rule of nonenforceability.) (Wellenkamp v. Bank of America, supra, 21 Cal.3d at p. 952,

fn. 9.) The wording of Dawn is no more helpful. For example, the lead paragraph of that opinion contains language that would support either notion: "Wellenkamp v. Bank of America (1978) 21 Cal.3d 943 [148 Cal.Rptr. 379, 582 P.2d 970], held that lender enforcement of a due-on-sale clause, contained in a deed of trust or promissory note secured by real property, constitutes an unreasonable restraint on alienation unless the lender can demonstrate that enforcement is reasonably necessary to protect against the impairment of security or risk of default. In the instant case we conclude that the Wellenkamp rule applies to noninstitutional lenders and to commercial property." (Dawn Investment Co. v. Superior Court, supra, 30 Cal.3d at p. 697.) The first sentence describes the Wellenkamp rule in broad terms, but

the second, instead of using language which would describe a disinclination to create an exception to the rule, instead speaks in terms of extending its reach.

We have concluded the ambiguous language of the cases will simply not yield a solution. Only by resort to analysis of the respective holdings does a reasonable answer emerge. Wellenkamp decided on a limited form of retroactivity for its holding: "given the importance of the stability of real estate titles and the interest in preserving completed real estate financing arrangements, we hold that this decision shall not apply when the lender, prior to the date that this decision becomes final, has either enforced the due-on clause, resulting in sale of the subject property by foreclosure or in discharge of the accelerated debt, or when the

lender has waived enforcement of the due-on clause in return for an agreement with the new buyer modifying the existing financing." (Wellenkamp v. Bank of America, supra, 21 Cal.3d at p. 954.) Dawn is silent on the obvious question of retroactivity, however, The Supreme Court could hardly have missed this critical question.

We conclude Dawn's conclusion can only mean the court viewed Wellenkamp as creating a broad rule against automatic enforeability of due-on-sale clauses and Dawn as refusing to create an exception for private lenders. The Supreme Court would surely have addressed the issue of Dawn's own retroactivity if that were not the case. On this subtle but, we believe, well founded distinction, we must conclude the post-Wellenkamp, pre-Act transfer to Lucas falls within

California's window period.[4] We agree Jones' security was not imparied by the transfer to Lucas. Thus enforement of the due-on-sale clause is prohibited. (12 U.S.C. § 1701j-3(c)(2)(B).[5])[6]

Order affirmed. Respondent shall recover costs on appeal.

/s/ Crosby
Crosby, J.

WE CONCUR:

/s/ Trotter
Trotter, P.J.

/s/ Sonenshine
Sonenshine, J.

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[4] We agree with Miranda v. Macias (1983) 141 Cal.App.3d 188 (see fn.6, post) and also "reserve ruling on whether the window was opened by any pre-Wellenkamp enactment or judicial decision for acase factually requiring such determination." (Id., at p. 192, fn. 1.)

[5] 12 U.S.C. section 1701j-3(c)(2)(B) provides, "A lender may not exercise its option pursuant to a due-on-sale clause in the case of a transfer of a real property loan which is subject to [subsection (c)] where the transfer occurred prior to October 15, 1982."

[6] After the parties submitted their briefs, Division One of this court published the opinion in Miranda v. Macias, supra, 141 Cal.App.3d 188 (hg. den. June 29, 1983).). Under remarkably similar facts, the court determined and concluded a post-Wellenkamp, pre-Dawn transfer of real property, subject to a private lender's loan, is within California's window period. (Id., at p. 192.) We have reached the same conclusion but under a different analysis.

Also, the Federal Home Loan Bank Board published interpretations and issued regulations implementing the Act, effective May 10, 1983. (48 Fed.Reg. 21554 et seq. (May 13, 1983); 12 C.F.R. §§ 591.1-591.6.) Federal regulations have the same preemptive effect as federal statutes (Fidelity Federal Sav. & Loan Assn. v. De La Cuesta (1982) 458 U.S. 141). However, the Federal Home Loan Bank Board limited the applicability of these rules "...to all federally-chartered and insured depository institutions, all state-chartered and state-insured depository institutions, and all other government or corporate entitites who fall within the definition of

'lender' in Pub.L 97-320 section 341(a)(2) [the Act]." (48 Fed.Red. 21560.) Thus the regulations do not apply to individual lenders like Jones.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

January 18, 1984

I have this day filed Order _____

_____ _____

HEARING DENIED

Grodin J OF THE OPINION THAT THE

PETITION SHOULD BE GRANTED

_____

In re: 4 Civ. No. 30171

VIOLET ANN LUCAS

vs.

DOSS S. JONES; WILMA JONES

Respectfully,

Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DOSS S. JONES; WILMA JONES,
Petitioners,

v.

VIOLET ANN LUCAS,
Respondent.

PETITION FOR CERTIORARI - CONTRACT CLAIM

PROOF OF SERVICE - CERTIFICATE
BY BAR MEMBER

I, William R. DeWolfe, one of the attorneys for Doss S. Jones and Wilma Jones, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on April 16, 1984, I served copies of the foregoing petition for certiorari on the

several parties thereto, as follows:

1. On Violet Ann Lucas, respondent, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to Musick, Peeler & Garret, Attorneys at Law, 1 Wilshire Blvd., Suite 2000, Los Angeles, CA 90017.

2. On T.D. Service Company, defendants below, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record, Alvarado, Rus & McClellan, 1 City Boulevard West, Suite 1120, Orange, CA 92668.

3. On Larry Sanders Johnson and Charlotte Elizabeth Johnson, plaintiffs below, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record, Passo, Holmes & Davis, 1600 North Broadway, Suite 530,

Santa Ana, CA 92706.

4. On the courts below, by mailing a copy in a duly addressed envelope, with first-class postage prepaid, as follows:

Orange County Superior Court, 700 Civic Center Drive West, Santa Ana, CA 92701;

Clerk, Court of Appeal, Fourth Appellate District, 303 West Third Street, Room 640, San Bernardino, CA 92401;

Office of the Clerk, California Supreme Court 4250 State Building, San Francisco, CA 94102.

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(714) 686-1450